APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

Civil Action No. 79-0007(H)

THE COMMONWEALTH OF PUERTO RICO,
ON THE RELATION OF CARLOS S.
QUIROS, SECRETARY, DEPARTMENT OF
LABOR AND HUMAN RESOURCES,
Plaintiff

v.

ALFRED L. SNAPP & SON, INC.,
ET AL.,
Defendants.

MEMORANDUM OPINION

TURK, Chief Judge.

During the spring and summer of 1978, weather and climatic conditions combined to produce a record apple crop in the orchards along the eastern coast of the United States. This suit concerns the recruitment of workers to harvest that crop.

Stated briefly, a statutory and regulatory scheme has been established by the federal government to insure that domestic workers are given priority over foreign workers for employment opportunities within the United States. *See generally,* Wagner-Peyser Act, 29 U.S.C. §49, *et seq.,* Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq;* 20 C.F.R. Part 655; 8 C.F.R. § 214 (h)(3). As the time for harvest draws near, the apple

growers, as do other crop growers, avail themselves of this system, known as the United States Employment Service, to secure laborers to work the harvest. This service is, in fact, a national system of public employment offices. If workers cannot be found locally, the interstate facilities are utilized to locate available workers in the domestic labor market. For purposes of this service, Puerto Rican workers are considered to be part of the domestic labor force. 29 U.S.C. § 49b(b). If the demand for workers exceeds the domestic labor supply, the employers may petition the Secretary of Labor for a certificate of need for foreign labor, 8 C.F.R. § 214.2(h) (3), 20 C.F.R. Part 655, and, if granted, apply to the Attorney General for non-immigrant visas for persons to perform temporary labor. 8 U.S.C. § 1101(a) (15) (H) (II); 8 U.S.C. § 1184(c).

Commencing in April, 1978, apple growers in New York, Maryland, Virginia, and West Virginia sought to secure seasonal labor for the late summer and early autumn apple harvest through the interstate clearance system. The implementaton of this process, however, was to run a troubled, confused and turbulent course. Ultimately, on the day on which the brief harvest period was to begin, far fewer workers were in the orchards than were needed for the task. This situation posed the very real danger that certain varieties of apples would over-ripen on the trees, thereby greatly diminishing their commercial value. Shortly before the harvest was to begin,the apple growers of the several states filed suit

in this court seeking a mandatory injunction against the United States Secretary of Labor, the Commissioner of the Immigration and Naturalization Service, and their subordinates, to permit the recruitment and employment of foreign workers. The Commonwealth of Puerto Rico was permitted to intervene on behalf of its citizens who allegedly would have been displaced by the employment of foreign workers. To insure that the harvest would be completed, this court entered a preliminary injunction ordering that a certain number of foreign workers be allowed to enter this country to pick the apples. *Frederick County Fruit Growers Association, Inc., et al. v. Marshall, et al., Civ. Action No. 78—0086(H)* (August 31, 1978), *appeal dismissed and remanded,* 594 F.2d 857 (4th Cir. 1979) (unpublished).

During the arguments preceding the entry of the preliminary injunction, it was represented to this court that the apple growers recognized their obligation to give priority in their hiring process to the Puerto Rican workers notwithstanding a court order permitting the employment of foreign workers. The primary thrust of the instant suit is the assertion by the Commonwealth of Puerto Rico, on the relation of Carlos S. Quiros, Secretary of the Department of Labor & Human Resources, that the Virginia apple growers failed to fulfill their acknowledged obligation.

The present action was commenced on January 11, 1979. The named defendants are numerous companies and individuals engaged in the apple industry, all of

whom reside in Virginia. Jurisdiction is predicated upon 28 U.S.C. § 1331, and 28 U.S.C. § 1337. By its second amended complaint, plaintiff alleges that each defendant filed a clearance order with the Virginia Employment Commission, an agency associated with the Federal Employment Service System, containing job orders for a specified number of unskilled agricultural laborers. The Puerto Rico Employment Service, another member fo the interstated clearance system, received job offers from *all* east-coast apple growers totalling 2,318. By August 14, 1978, plaintiff allegedly had recruited 1,094 Puerto Rican workers and thereafter continued its recruitment process until a sufficient number of workers were obtained to satisfy the job orders. Of the 2,318 Puerto Rican workers recruited by plaintiff, only 992 such workers were transported to the mainland, allegedly because of oral advice received from the United States Department of Labor to the effect that the growers had refused to employ those Puerto Rican workers who had arrived previously. The Virginia growers who are defendants here are alleged to have made commitments to employ 787 Puerto Rican workers although only 420 workers arrived in the Virginia orchards as a result of the Labor Department's warning. Within three weeks of their arrival, fewer than 30 remained employed. It is alleged that the remainder were either unable to secure the promised employment or, if employed, were dismissed for lack of productivity or picking damaged fruit. Plaintiffs also allege that the

Puerto Rican workers were subjected to less favorable working conditions than the Jamaicans who had been recruited pursuant to the court order. Such discrimination allegedly benefited the productivity of the Jamaican workers to the detriment of that of the Puerto Ricans. For the alleged failure to employ, unequal treatment, and improper termination, plaintiff seeks a declaration that defendants' actions were in violation of the Wagner-Peyser Act, 29 U.S.C. § 49 *et seq.*, the Immigration and Nationality Act of 1952, 8 U.S.C. § 1101 *et seq.*, as amended, and the regulations promulgated under each, and permanent injunction to enjoin any future violation of the same.

On February 15, 1979, defendants filed a motion to dismiss asserting, *inter alia*, that plaintiff lacked standing to bring this action. After all briefs were submitted, the court heard oral argument on March 7, 1979. After a careful evaluation of the facts alleged in the complaint in light of the evolution of the doctrine of *parens patriae* standing, the court is of the opinion that the motion is well taken and that dismissal of the complaint is required.

The concept of *parens patriae* standing is a rather elusive one which does not lend itself to precise definition. As a preliminary matter, it should be distinquished from those instances where a state seeks to redress an injury sustained in its proprietary capacity, as where a state sues as an injured consumer. *See, e.g. Hawaii v. Standard Oil Co.*, 405 U.S. 251, 92 S.Ct. 885, 31 L.Ed.2d 184 (1972). Before assessing the merits of the instant case, three observations should be made regarding the present posture of this case. First, the Commonwealth brings this suit solely in its capacity as *parens patriae*. No separate proprietary interest in this litigation has been asserted. At best, any such interest

would be predicated necessarily upon the harm to the general economy, the consequential reduction in state revenues, and the increased payment of public benefits. Taken to its logical conclusion, this proposition would permit a state to challenge any business or governmental decision which would adversely affected its economy. The connection between this proprietary concern of the state and alleged wrong is too attenuated to be cognizable for purposes of standing. *Pennsylvania ex rel. Shapp v. Kleppe*, 174 U.S. App.D.C. 441, 445, 533 F.2d 668, 672 (1976). Rather, redress for these wrongs must be sought in the role of *parens patriae*. Second, if *parens patriae* standing is appropriate, the Commonwealth of Puerto Rico is an entity capable of asserting that interest. *Commonwealth of Puerto Rico v. S.S. Zoe Calocotroni*, 456 F.Supp. 1327 (D.P.R.1978); *compare City of Hartford v. Towns of Glastonbury*, 561 F.2d 1032 (2d Cir. 1976); *Board of Supervisors of Fairfax County, Virginia v. United States* 408 F.Supp. 556 (E.D.Va.1976), *appeal dismissed* 551 F.2d 305 (4th Cir. 1977). Finally, plaintiff seeks only declaratory and injunctive relief. Thus, the court is spared the necessity of wrestling with the thorny problems inherent in *parens patriae* damage actions. *See generally, Hawaii v. Standard Oil Co.of California*, 405 U.S. 251, 92 S.Ct. 885, 31 L.Ed.2d 184 (1972) (anti-trust damages); *California v. Frito-Lay, Inc.*, 474 F.2d 774 (9th Cir.), *cert. denied* 412 U.S. 908, 93 S.Ct. 2291, 36 L.Ed.2d 974 (1973) (class action); *West Virginia v. Chas. Pfizer and Co.*, 440 F.2d 1079 (2d Cir.), *cert. denied sub nom. Cotler Drugs, Inc. v. Chas. Pfizer & Co.*, 404 U.S. 871, 92 S.Ct. 81, 30 L.Ed. 2d 115 (1971) (class action); *In re Motor Vehicle Air Pollution Control Equipment*, 52 F.R.D. 398 (C.D.Cal.1970), *cert. denied* 414 U.S. 1045, 94 S.Ct. 551, 38 L.Ed.2d 336 (1973) (class action); *In re Montgomery*

County Real Estate Litigation, 452 F.Supp. 54 (D.Md.1978); *Note, State Protection of its Economy and Environment: Parens Patria Suits for Damages,* 6 Columbia J.L. & Soc.Prob. 411 (1970).

As in all other cases where the standing of a party to bring suit is in issue, the court is called upon to determine whether the plaintiff has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination." *Baker* v. *Carr,* 369 U.S. 186, 204, 82 S. Ct. 691, 703, 7 L.Ed. 2d 663 (1962). No once could challenge the sincerity with which the Commonwealth now seeks to vindicate the interests of its citizens. The essential "concrete adverseness" being assured as a practical matter, the court nevertheless must inquire further to ensure that a state has alleged more than "a mere 'interest in a problem.' " *Sierra Club* v. *Morton,* 405 U.S. 727, 739, 92 S.Ct. 1361, 1368, 31 L.Ed. 2d 636 (1972). A state cannot, of course, volunteer to litigate a collection of the private claims of its citizens merely because it expresses an interest in doing so. *Pennsylvania v. New Jersey,* 426 U.S. 660, 96 S.Ct. 2333, 49 L.Ed.2d 124 (1976); *New Hampshire v. Louisiana,* 108 U.S. 76, 2 S.Ct. 176, 27 L.Ed. 656 (1883). To satisfy the threshold jurisdictional requirement, a sovereign entity seeking to act in the capacity of *parens patriae* must assert a "quasi-sovereign" interest. *Hawaii v. Standard Oil Co., supra.* Whether such an interest has been stated depends essentially upon the type of interest asserted and the magnitude of the harm involved.

A quasi-sovereign interest has been defined variously as "an interest independent of and behind the

titles of its citizens," *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237, 27 S.Ct. 618, 619, 51 L.Ed. 1038 (1907), and as "an interest apart from that of the individuals affected," *Pennsylvania v. West Virginia*, 262 U.S. 553, 592, 43 SCt. 658, 663, 67 L.Ed. 1117 (1923). Thus, the sovereign interests implicated in the litigation must be sufficiently independent of the interests of the individual citizens to justify state *parens patriae* standing; the injuries to the state and the citizens need not, and usually cannot, be wholly independent. Note, *State Protection of Its Economy and Environment: Parens Patriae Suits for Damages, supra.* Derived from the original power of the King to act as "parent of the country" for the protection of those unable to act for themselves, the traditional concept of a quasi-sovereign interest has been expanded during this century to reach issues involving the health, safety, and welfare of the state's residents. *Hawaii v. Standard Oil Co., supra.* Today, a state may bring suit to protect the public interest so long as that interest is not so vague and remote as to appear ethereal. *Compare Kelley v. Carr*, 442 F.Supp. 346 (W.D. Mich. 1977) *with Pennsylvania ex rel. Rafferty v. Philadelphia Psychiatric Center*, 356 F.Sup. 500 (E.D.Pa. 1973).

The quasi-sovereign interest in the present case arises from the interest of the Commonwealth in the health of its general economy. It is clear that Puerto Rico has been plagued with seriously high levels of unemployment. During September, 1978, 18.5% of the adults in the labor market were unemployed. The problem was even worse in the rural areas where the unemployment figure reached 23%. Plaintiff argues that the challenged activities of defendant served to frustrate its efforts to obtain greater employment opportunities for its

citizens. As a consequence, the expansion of the supply of money in circulation was less than it otherwise would have been, fewer tax revenues were gathered, and additional public benefits were required to be expended. The Commonwealth also asserts an interest in the proper application of federal laws which mandate a preference for Puerto Rican workers over foreign workers. Non-compliance with these laws serves to exacerbate the already serious employment problem present on the island. Thus stated, plaintiff has alleged an interest in the protection and preservation of its general economy, an interest which clearly implicates its quasi-sovereign capacity. *Georgia v. Pennsylvania Railroad Co., et al.*, 324 U.S. 439, 65 S.Ct. 716, 89 L.Ed. 1051 (1945); *Pennsylvania* v. *West Virginia*, 262 U.S. 553, 43 S.Ct. 658, 67 L.Ed. 1117 (1923).

Once the quasi-sovereign interest has been identified, it must be assessed against the backdrop of the development of the *parens patriae* doctrine.[1] An analysis of the principal decisions which sketch the nebulous perimeter of the theory discloses three crucial factors which influence the decision to grant or deny standing: the size of the segment of the population that has been adversely affected, the magnitude of the harm inflicted, and the practical ability of those injured to obtain complete relief.

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[1]Although many of the decisions which developed the *parens patriae* doctrine dealt primarily with questions of the original jurisdiction of the Supreme Court pursuant to Article III § 2 of the United States Constitution, they do provide precedential value in the case at bar. *Hawaii v. Standard Oil Co., supra.* Similarly, the principles of these cases are applicable notwithstanding the Eleventh Amendment considerations which appear in some of the cases. *Pennsylvania v. National Association of Flood Insurers*, 520 F.2d 11, 22-23 n. 26 (3rd Cir. 1975).

Since the propriety of this expanded motion of *parens patriae* standing was recognized in *Louisiana v. Texas*, 176 U.S. 1, 20 S.Ct. 251, 44 L.Ed. 347 (1900), it has been emphasized that the State must be seeking to represent a significant portion of its populace. In *Louisiana v. Texas, supra* and *Oklahoma v. Atchison, Topeka and Santa Fe Railway Co.*, 220 U.S. 277, 31 S.Ct. 434, 55 L.Ed. 465 (1911), the Court noted that original jurisdiction was absent when the suit by the State was for the vindication of the grievances of particular individuals. Consistent with this thesis, *parens patriae* standing has been denied whenever the litigation was intended to benefit the individual interests of a narrow class of citizens, such as a particular industry. *Oklahoma v. Atchison, Topeka and Santa Fe Railway Co., supra* (freight shippers); *Jones ex rel. Louisiana v. Bowles*, 322 U.S. 707, 64 S.Ct 1043, 88 L.Ed. 1551 (1944) (strawberry industry); *accord: Land O'Lakes Creameries, Inc. v. Louisiana State Board of Health*, 160 F.Supp. 387 (E.D.La.1958) (dried milk manufacturers); *but see Louisiana v. Weinberger*, 404 F. Supp. 894 (E.D.La.1975) (turtle industry). Nor may a state undertake to represent a mere collectivity of purely personal claims. *Pennsylvania v. New Jersey, supra* (tax claims); *Oklahoma ex rel. Johnson v. Cook*, 304 U.S. 387, 58 S.Ct. 954, 82 L.Ed. 1416 (1938) (creditors and depositors of a state bank); *New Hampshire v. Louisiana*, 108 U.S. 76, 2 S.Ct. 176, 27 L.Ed. 656 (1883) (bond holders). In contrast to these cases are those where a substantial segment of the States citizens has a deep concern with the success of the litigation, e.g. *Missouri v. Illinois*, 180 U.S. 208, 21 S.Ct. 331, 45 L.Ed. 497 (1901); *Pennsylvania v. West Virginia*, 262 U.S. 553, 43 S.Ct. 658, 67 L.Ed. 1117 (1923). In *Missouri v. Illinois, supra*, an artificial canal had been constructed to allow the sewerage of the City of Chicago to flow into the Mississippi River. Faced with an alarming

increase in the rate of mortality from typoid fever and other contagious diseases as a result of the pollution of the river, the State of Missouri sought to enjoin the discharge of sewerage. The Court noted that not only would the large communities located on the river be affected, but the economic repercussions would "injuriously affect the entire state." Id. at 241, 21 S.Ct. 331.[2] Some twenty years later, the Court was called upon to decide whether West Virginia, then the largest domestic producer of natural gas, could enact legislation which would severely curtail the flow of natural gas into Ohio and Pennsylvania. *Pennsylvania v. West Virginia, supra.* It was represented to the Court that approximately 1,500,000 citizens of Pennsylvania and 3,625,000 citizens of Ohio were dependent upon the natural gas produced in West Virginia. *Id.* at 590, 43 S.Ct. 658. Finding, that the affected consumers constituted a "significant portion of the State's population," *Id.* at 592, 43 S.Ct. at 663, the Court permitted the action to proceed to judgment. Thus, once the segment of the population adversely affected by the challenged activity approaches proportions which could be considered "significant", the public interest transcends the interest of the individual citizens, thereby allowing the state to seek to vindicate the broader cause.

Consideration must also be given to the magnitude of the harm which is caused or threatened to be caused by the asserted wrong. The proposed termination of natural gas supplies in *Pennsylvania v. West Virginia, supra* would have clearly led to a substantial disruption

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[2]Missouri eventually prevailed in this litigation and the discharge of sewerage into the Mississippi River was enjoined. *Missouri v. Illinois,* 200 U.S. 496, 26 S.Ct. 268, 50 L.Ed. 572 (1906).

of the local economies of Ohio and Pennsylvania. An impact of similar dimensions was alleged in *Georgia v. Pennsylvania Railroad Co., et al.*, 324 U.S. 439, 65 S.Ct. 716, 89 L.Ed. 1051 (1945) when Georgia complained that the twenty defendant railroad companies had conspired to fix non-competitive rates and charges for the transportation of freight. As a result, Georgia alleged that its economy was in a state of arrested development, its measures to diversify frustrated, and its access to the national market restricted. *Id.* at 444, 65 S.Ct. 716. Georgia was also considered to be the proper party plaintiff when it sought to enjoin the discharge of noxious gas which had caused the wholesale destruction of forests, orchards, and crops in a five county area. *Georgia v. Tennessee Copper Co., 206 U.S.* 230, 27 S.Ct. 618, 51 L.Ed. 1038 (1907). Even where the direct injury falls upon a relatively narrow class of persons, a state may still be allowed to proceed with the action if there are substantial generalized economic effects. *See Hawaii v. Standard Oil Co., supra; Pennsylvania ex rel. Shapp v. Kleppe, supra.* The Court must therefore determine whether the adverse conditions flowing from the challenged conduct are sufficiently severe and widespread as to constitute a wrong against the public interest.

Lastly, the ability of a state to represent its citizens is dependent in part on the presence or absence of other potential or actual plaintiffs who could obtain substantially similar relief. This consideration stems from the observation made by the Court in *Missouri v. Illinois, supra* that individual suits for personal injuries would provide "wholly inadequate and disproportionate remedies" in light of the grave threat to the health of the state posed by the sewerage discharge. *Id.* at 241, 21 S.Ct. 331. Since that time, the

Court has consistently denied *parens patriae* states to state plaintiff's whenever it appeared that the individual citizens were capable of maintaining and prosecuting their own actions for relief. *Pennsylvania v. New Jersey, supra; Hawaii v. Standard Oil Co., supra; see also New Hampshire v. Louisiana,* 108 U.S. 76, 2 S.Ct. 176, 27 L.Ed. 656 (1883). The need for state representation in those instances being obviated, it then becomes apparent that the state plaintiff is attempting to vindicate a collection of private interests rather than its own quasi-sovereign interest.

having contrasted the allegations in the instant complaint against this background, the court is of the opinion that the Commonwealth may not proceed as *parens patriae.* In sheer numbers alone, it is clear that relatively few residents of Puerto Rico were harmed directly by the alleged activities of defendants. At best, only 787 persons out of a total population of 2,712,033[3] were so effected. This segment of the population falls far below the "substantial majority" suggested by some courts. *Pennsylvania ex rel. Shapp v. Kleppe, supra,* 174 U.S.AppD.C. at 448, 533 F.2d at 675. It must also be noted that the jobs which are the subject of this litigation were temporary in nature with a maximum duration of approximately two months. Given these facts, it is apparent that the impact of the alleged wrongs upon the general economy of Puerto Rico was relatively slight and that any harm which might have ensued was neither sufficiently severe nor generalized to permit the Commonwealth to take up the cause.

Plaintiff maintains that the Secretary of the Department of Labor and Human Resources has been charged with a statutory duty to protect the rights of the

[3]1970 census as contained in the *World Almanac and Book of Facts* (1978).

Puerto Rican migrant workers, 3 Pub.L. 87, as amended, and that such authority empowers the Secretary to represent their interests in this action. The Commonwealth informed this court that it intends to use this power vigorously to protect its migrant workers involved in the harvest of other crops as well. While a state could be precluded from commencing an action absent such authority, a statutory enactment cannot, in and of itself, confer Article III standing upon a state plaintiff to sue in the federal courts. *Land O'Lakes Creameries v. Louisiana State Board of Health,* 160 F.Supp. 387 (E.D.La.1958) The premise on which the Commonwealth proceeds is, of course, that the individual victims are unable as a practical or realistic matter to represent their own interests effectively. Despite this pessimism, these "[p]rivate citizens are not as powerless, however, as the State suggests." *Hawaii v. Standard Oil Co., supra,* 405 U.S. at 265, 92 S.Ct. at 893. It has been represented to the court by counsel for both parties that numerous individual law suits, as well as a broad based class action suit, have been filed in the Puerto Rican and federal courts by some of the displaced workers against some of the growers, including several who are defendants herein. Should the plaintiffs in those actions prevail on the merits, no greater relief could be obtained from this court. Since those most directly affected stand ready and willing to vindicate their own rights, the imperative for state intervention is absent. The court can detect no valid purpose to be served by allowing this action to proceed when the fundamental issues are already being litigated elsewhere.

To reiterate, the court finds that the allegations in the complaint fail to present a justiciable quasi-sovereign interest. Neither the segment of the population nor the

injury to the Puerto Rican economy is of sufficient magnitude to permit this court to grant *parens patriae* standing. On balance, the private interests of the victimized classs appear to predominate over the alleged broader public interest and, in fact, are being actively pursued in other judicial forums. This private litigation renders the efforts of the Commonwealth gratuitous and empty. The issue here is not one of sincerity of motive. Rather, it is one of practical judicial administration. When the asserted public interest is, upon closer inspection, relatively narrow in scope, a court must question the propriety of *parens patriae* standing. Given the particular circumstances of this case, the court is constrained to hold that the Commonwealth is not entitled to proceed in that capacity. An appropriate order will this day be entered.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 79-1349

The Commonwealth of Puerto Rico
on the Relation of Carlos S. Quiros,
Secretary, Department of Labor and
Human Resources,

Appellants,

v.

Alfred. L. Snapp & Sons, Inc.; Alfred L. Snapp, Sr., Chief Officer; John T. Watt & Son, a corporation d/b/a/ Timber Ridge Fruit Farm; John T. Watt, Jr., Manager; Orchard Management Co., Inc.; Harry F. Byrd, III, President-Treasurer; D.K. Russell & Sons, Inc.; J. Robert Russell, President; Whitman Orchards, a corporation; Gordon T. Whitman, President; Robert Boyd, a corporation t/a CLoverdale Farm; Robert J. Boyd, President-Treasurer; the C.L. Robinson Corporation; Delmar Robinson, Jr., President; R & T Packing Corporation; C. Robert Solenberger, President; E. Blackburn Moore; Fred L. Glaize, Jr. & Philip B. Glaize d/b/a/ Cresent Orchards; Frederick Farms; James R. Robinson, Manager; George B. Whitacre; H.F. Byrd & T.B. Byrd; John E. Crumpacker, Manager; H.F. Byrd; Harvey Brumback; James Clevenger; McDonald Farms; Messick & Beaver; James Beaver; Frank L. Snapp & Elmer G. Snapp d/b/a/ H.T. Snapp & Son; Frank L. Snapp; Elmer G. Snapp; R. Roland Snapp; Robert E. Wyatt; Stanley Bauserman; Stewart Bell; Woodside Farm; John W. Smith; William S. Franklin; Wayne S. McInturff; James B. Swing; George Cather; Garland R.

Cather; Irvin R. King; Albert W. Messick; C.H. Orchards.

Appellees.

Appeal from the United States District Court for the Western District of Virginia at Harrisonburg. James C. Turk, Chief District Judge.

Argued: April 8, 1980 Decided: October 9, 1980

Before BUTZNER, HALL AND SPROUSE, Circuit Judges,

Paul A. Lenzini (Luis Guinot, Charles S. Fax, Lynda R. Troutman on brief) for Appellant; S. Steven Karalekas (Thomas J. Bacas, Charles Karalekas & Bacas; William A. Johnson, Harrison & Johnston on brief) for Appellees.

Paul A. Lenzini (Luis Guinot, Charles S. Fax, Lynda R. Troutman on brief) for Appellant; S. Steven Karalekas (Thomas J. Bacas, Charles, Karalekas & Bacas; William A. Johnson, Harrison & Johnston on brief) for Appellees.

SPROUSE, Circuit Judge:

This is an appeal by the Commonwealth of Puerto Rico[1] from an order of the district court dismissing its complaint against a number of apple growers in the State of Virginia. The district court held that Puerto Rico lacks standing under the doctrine of parens patriae to maintain this action.

[1]On the relation of its Secretary of Labor and Human Resources.

There are fifty-two defendants, all engaged in the business of growing apples in Virginia (the Growers). The complaint alleged that the Growers violated laws of the United States which prefer domestic laborers (citizens of the United States) over foreign temporary laborers. It also alleged that the Growers violated their agreements to hire Puerto Rican farm workers, and discriminated against those who were hired in favor of Jamaican farm workers. The complaint sought a declaration of the rights of Puerto Rican citizens under the Wagner-Peyser Act of 1933, 29 U.S.C. §§ 49—49k as partially implemented by the Immigration and Nationality Act, 8 U.S.C. §§ 1101 *et seq.* and the Temporary Foreign Labor Certification Regulations, 20 C.F.R. §§ 655.0 *et seq.* Puerto Rico alleged irreparable injury to its citizens and sought to enjoin the Growers from future violations of these federal laws.

The Growers, assigning a number of grounds, moved for dismissal of the complaint. The trial court granted the motion to dismiss on one ground only-that Puerto Rico failed to present a justiciable quasi-sovereign interest and, therefore, lacked standing under the doctrine of parens patriae. This is the sole issue on appeal.

There was a record apple crop in the orchards along the eastern coast of the United States in 1978. This generated heavy activity to recruit temporary farm workers to pick the apples. The recruiting efforts, however, were not unique to 1978, nor to the eastern coastal area of the country. The phenomenon of recruiting temporary farm workers has produced both benefits and problems for those involved for a considerable number of years.

Congress has created a strong preference favoring domestic workers. It enacted the Wagner-Peyser Act in 1933 to facilitate the flow of labor from supply

states to demand states during that period of depression and high unemployment. This Act, among other things, established the interstate clearance system administered by the United States Department of Labor. Employers transmit their job offers to units of the system—in this case the Puerto Rican Employment Service. To complement the Wagner-Peyser Act, Congress amended the Immigration and Nationality Act, prohibiting the entry of aliens as temporary laborers as long as capable United States workers are available. Only if the demand for workers exceeds the domestic labor supply may employers petition the Secretary of Labor for certificates of need for foreign labor. Puerto Rican workers, of course, are part of the domestic labor force.

I. We must, in considering the correctness of a ruling on a Fed.R.Civ.P. 12(b) motion, accept as true all material allegations of the complaint. *Warth v. Seldin*, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). So construed, the complaint reflects the following facts. Puerto Rico, in 1978, had a record rate of unemployment conservatively estimated at 23% in the rural areas and 18.5% throughout the Comonwealth. It took a number of steps to alleviate this condition. It made a concerted effort to place Puerto Rican workers with mainland apple growers, including the defendants. The Puerto Rican Employment Service, in response to requests for Puerto Rican workers made through the interstate clearance system in 1978, recruited 2,318 workers. Nine hundred ninety-two of these workers were dispatched to mainland United States. The Puerto Rican Employment Service was then advised, however, to prohibit the remainder from departing Puerto Rico,

because the Growers were refusing to employ Puerto Rican workers when they appeared at their orchards.

Concurrently with this sequence of events, apple growers in several states filed a suit in 1978 in the district court for the Western District of Virginia. *Frederick County Fruit Growers Association, Inc. v Marshall,* Civ. Action No. 78-0086(H) (August 31, 1978), *appeal dismissed and remanded,* 594 F.2d 857 (4th Cir. 1979) (unpublished). That action is not involved in this appeal but is part of the background helpful to understanding the single issue presented here. In that injunction action against the United States Secretary of Labor and the Commissioner of Immigration and Naturalization Service, the apple growers sought to recruit and employ foreign workers. The district court granted a preliminary injunction forcing the issuance of visas for foreign workers in order to ensure the harvesting of an undamaged apple crop. Puerto Rican workers thereafter appearing at the orchard gates were either denied employment or were subsequently terminated from their employment prior to the expiration of their contracts.

II. The prosectuion of parens patriae actions by a state on behalf of its citizens is a practice long embedded in Anglo-American law, *Louisiana v. Texas,* 176 U.S. 1, 20 S.Ct.251, 44 L.Ed. 347 (1900), which has been expanded in this century, *Hawaii v. Standard Oil Co.,* 405 U.S. 251, 92 S.Ct. 885, 31 L.Ed.2d 184 (1972). In order to assert such standing, however, a state must act pursuant to a "quasi-sovereign" interest. *Hawaii v. Standard Oil Co., supra; Georgia v. Pennsylvania Railroad Co.,* 324 U.S. 439, 65 S.Ct. 716, 89 L.Ed. 1051(1945); *Pennsylvania v. West Virginia,* 262 U.S. 553, 43 S. Ct. 658, 67 L.Ed. 1117 (1923); *Georgia v. Tennessee*

Copper Co., 206 U.S. 230, 27 S.Ct. 618, 51 L.Ed. 1038 (1907). There is no specific term of art defining a "quasi-sovereign" interest. In *Georgia v. Tennessee Copper Co.*, 206 U.S. at 237, 27 S.Ct. at 619, the Supreme Court defined it as "an interest independent of and behind the titles of its citizens." In *Pennsylvania v. West Virginia*, 262 U.S. at 592, 43 S.Ct. at 663, it was said to be "an interest apart from that of the individuals affected."

These traditional concepts of quasi-sovereign interests have not changed over the years except to accommodate expanding judicial roles. The modern approach recognizes as appropriate a quasi-sovereign state action involving the health, safety and welfare of its citizens. *Commonwealth of Pennsylvania by Shapp v. Kleppe*, 533 F.2d 668 (D.C.Cir.1976). An interest in the general economy of the state is sufficient to base an action brought by a state in its quasi-sovereign capacity. *Georgia v. Pennsylvania Railroad Co., supra.* As the role of state government has expanded, more diverse "protectable" interests have been recognized. *See, e.g., Kelley v. Carr*, 442 F.Supp. 346 (W.D.Mich.1977); *Commonwealth of Pennsylvania ex rel. Rafferty v. Philadelphia Psychiatric Center*, 356 F.Supp. 500 (E.D.Pa. 1973).

In *Georgia v. Pennsylvania Railroad Co., supra*, the Supreme Court permitted Georgia to sue parens patriae to outlaw discriminatory railroad freight rates. The Supreme Court said:

> [D]iscriminatory rates fastened on a region have a more permanent and insidious quality. Georgia as a representative of the public is complaining of a wrong which, if proven, limits the opportunities of her people, shackles her industries, retards her

> development, and relegates her to an inferior economic position among her sister States. These are matters of grave public concern in which Georgia has an interest apart from that of particular individual who may be affected. Georgia's interest is not remote; it is immediate. If we denied Georgia as *parens patriae* the right to invoke the original jurisdiction of the Court in a matter of that gravity, we would whittle the concept of justiciability down to the stature of minor or conventional controversies. There is no warrant for such a restriction.

324 U.S. at 451, 65 S.Ct. at 723.

The complexities of modern government make it impossible to catalogue the economic interests which can be protected by the sovereign as parens patriae. As the United States Court of Appeals for the District of Columbi Circuit has said:

> The nature of the economic or welfare interest necessary to justify state standing is one of the more obscure issues with which we must deal. The valid though largely unhelpful generality which guides us is that the controversy must in substance implicate the state's interest in economic supervision, and not merely affect the fortunes of a limited class of her citizens.
>
> .... [E]ven where the most direct injury is to a fairly narrow class of persons, there is precedent for finding state standing on the basis of substantial generalized economic effects (footnotes omitted).

Pennsylvania v. Kleppe, 533 F.2d at 674-75.

Three factors normally determine whether the quasi-soverign interest is sufficiently important to permit standing: the size of the segment of the population that has been adversely affected, the

magnitude of the harm inflicted, and the practical ability of those injured to obtain complete relief without intervention by the sovereign. *Pennsylvania v. Kleppe, supra.*

The decisions have generally agreed that a substantial proportion of the population of the sovereign must be affected in order that the sovereign may represent them in a parens patriae capacity. There has been no attempt, however, to reduce this requirement to an exact definition. For example, in *Pennsylvania v. West Virginia, supra,* the economic interest considered involved virtually every citizen of Ohio and Pennsylvania. In other cases, the Supreme Court has indicated that a state is just as legitimately concerned in its quasi-sovereign capacity when a substantial interest of an area smaller than the entire state is affected. *Hawaii v. Standard Oil Co., supra; Georgia v. Tennessee Copper Co., supra; Pennsylvania v. Kleppe, supra.*

While a state in its parens patriae capacity obviously cannot maintain a suit to redress simple injuries to private citizens, *Oklahoma v. Atchison, Topeka & Santa Fe Railroad Co.,* 220 U.S. 277, 31 S.Ct. 434, 55 L.Ed. 465 (1911); *Missouri v. Illinois,* 180 U.S. 208, 21 S.Ct. 331, 45 L.Ed 497 (1901); *Pennsylvania v. Kleppe, supra; Land O'Lakes Creameries, Inc. v. Louisiana State Board of Health,* 160 F. Supp. 387 (E.D.La. 1958), the fact that some of the citizens of the sovereign may be benefited and others not affected by the suit, is not necessarily determinative. Any such suit will benefit some citizens of a state more than others.

The district court in the instant case held that "[n]either the segment of the population nor the injury to the Puerto Rican economy is of sufficient magnitude to permit this court to grant *parens patriae* standing." We disagree.

Puerto Rico as a commonwealth of the United States may, of course, represent its citizens if appropriate quasi-sovereign interests are involved. *Commonwealth of Puerto Rico* v. *S.S. Zoe Colocotroni,* 456 F.Supp. 1327 (D.P.R. 1978).

The Puerto Rico Department of Labor is charged by law to encourage and develop the interest and welfare of the laborers of Puerto Rico, to improve their working conditions and to promote their opportunities to obtain profitable employment. P.R.Laws Ann. tit. 3 §§ 305-06 (1965). It has brought this suit in furtherance of its efforts in this regard. Puerto Rico has an unemployment problem of the gravest dimensions. The United States government, in the midst of a devastating depression in 1933, was faced with the same problems in all of its states and territories, and as one of the many efforts to combat that depression, enacted the Wagner-Peyser Act. The continued utilization of this legislation through the years is not in itself a consideration in determining standing in this case. Puerto Rico's 23% rural unemployment, however, approaches the economic devastation generally rampant in the United States at the time Wagner-Peyser was enacted. This is significant.

Puerto Rico's effort to strengthen its economy and to provide its citizens a way of life comparable to mainland standards must be viewed from a clear perspective. The number of farm workers temporarily employed annually does not accurately measure the potential effect of the damaged recruitment efforts on all of Puerto Rico's citizens. The island's officials are coping with an almost unmanageable unemployment problem. Its economy is in dire straits. The morale of the average Puerto Rican citizen under the circumstances can be expected to be extremely low. Deliberate efforts to stigmatize the labor force as inferior carry a universal sting.

The Puerto Rican government as an integral political subdivision relies on federal laws to help solve the problems of labor supply and demand. The apparent inability of the United States government, through the Department of Labor, to grant Puerto Ricans equal treatment with other citizens or even with foreign temporary workers must certainly have an effect which permeates the entire island of Puerto Rico. Residual injuries to the Commonwealth effort are, to say the least, very serious.

Although a parens patriae representation requires that a substantial portion of the citizens of the sovereign be affected, this requirment is satisfied whether they are affected directly or whether they are indirectly affected. There has never been cast a hard and fast game of numbers.[2] Parens patriae standing is appropriate where a sovereign seeks to protect a vital aspect of the general welfare of a substantial portion of its citizenry from serious, harmful, offensive conduct. It is the magnitude and the pervasiveness of the societal harm that must be weighed-not the directness of the injury to particular individuals.

The Growers contend that suits by individual workers will better achieve the results intended by the instant parens patriae action. We are not persuaded. The complaint alleges irreparable harm to future workers and to citizens in Puerto Rico who do not intend to migrate. Migrant farm workers are so destitute that they must leave their homes for two or three

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[2]Most of the Pennsylvania and Ohio citizens in *Pennsylvania v. West Virginia, supra,* were directly affected in their economic well being. Only some of the citizens of Georgia were directly affected by the noxious fumes in *Georgia v. Tennessee Copper Co., supra.* Most of the Georgia citizenry were only indirectly affected by the improper rate—fixing practices in *Georgia v. Pennsylvania Railroad Co., supra.*

months each year to seek employment. It cannot be said with any assurance that they are in positions to litigate these issues effectively. They would, at best, achieve a piecemeal solution of Puerto Rico's parens patriae grievances and in the process wastefully consume judicial resources.

We, of course, do not pass on the merits of the complaint. There is nothing in the record to indicate the truth or falsity of the allegations. We only hold that Puerto Rico has standing to maintain this action in a parens patriae capacity.

Reversed and remanded for actions consistent with the opinions expressed in this decision.

REVERSED AND REMANDED.

K.K. HALL, Circuit Judge, dissenting:

I do not agree with the result reached by the majority which permits the Commonwealth of Puerto Rico to proceed in this litigation as *parens patriae*. Admittedly, the issue in the context of this appeal presents a very close question. Nevertheless, I am satisfied that the district court acted within the guidelines set forth in *Commonwealth of Pennsylvania by Shapp v. Kleppe*, 533 F.2d 668 (D.C.Cir. 1976), and properly considered the number of people affected by the Growers' alleged activities, the potential economic impact, and the ability of the workers to litigate their own claims. Accordingly, I would affirm the dismissal of the complaint.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 79-1349

The Commonwealth of Puerto Rico
on the Relation of Carlos S. Quiros,
etc.,

Appellant,

versus

Alfred L. Snapp & Sons, Inc., et al,

Appellees.

ORDER

Upon consideration of the appellees' petition for rehearing and suggestion for rehearing en banc, and no judge having requested a poll on the suggestion for rehearing en banc,

It is ADJUDGED and ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Sprouse with the concurrence of Judge Butzner. Judge Hall would have granted rehearing.

For the Court,

/s/ William K. Slate, II
CLERK

APPENDIX D
STATUTORY PROVISIONS

Immigration and Nationality Act of 1952, 8 U.S.C. § 1101 (1)(15)(H):

(a) As used in this chapter—

* * *

(15) The term "immigrant" means every alien except an alien who is within one of the following classes of nonimmigrant aliens—

* * *

(H) An alien having a residence in a foreign country which he has no intention of abandoning (i) who is of distinguished merit and ability and who is coming temporarily to the United States to perform services of an exceptional nature requiring such merit and ability; or (ii) who is coming temporarily to the United States to perform temporary services or labor, if unemployed persons capable of performing such service or labor cannot be found in this country; or (iii) who is coming temporarily to the United States as a trainee; and the alien spouse and minor children of any such alien spouse and minor children of any such alien specified in this paragraph if accompanying him or following to join him.

Immigration and Nationality Act of 1952, 8 U.S.C. § 1184(c):

(c) The question of importing any alien as a non-immigrant under section 1101(a)(15)(H) or (L) of this title in any specific case or specific cases shall be determined by the Attorney General, after consultation with appropriate agencies of the Government, upon petition of the importing employer. Such petition shall be made and approved before the visa is granted. The petition shall be in such form and contain such information as the Attorney General shall prescribe. The approval of such petition shall not, of itself, be construed as establishing that the alien is a nonimmigrant.

REGULATIONS

Temporary Labor Certification Process Regulations, 20 C.F.R. Part 655 (1978):

§ 655.0 Scope and purpose of Part.

(a) *General.* This part sets out the procedures adopted by the Secretary to secure information sufficient to make factual determinations of: (1) whether U.S. workers are available to perform temporary employment in the United States, for which an employer desires to employ nonimmigrant foreign workers, and (2) whether the employment of aliens for such temporary work will adversely affect the wages or working conditions of similarly employed U.S. workers. These factual determinations (or a determination that there are not sufficient facts to make one or both of these determinations) are required by the Attorney General, acting through the Immigration and Naturalization Service (INS) of the Department of Justice, to assist the Attorney General to carry out the policy of the

Immigration and Nationality Act (INA), as implemented in the INS regulation at 8 CFR 214.2(h)(3)(i), that a nonimmigrant alien worker not be admitted to fill a particular temporary job opportunity unless no qualified U.S. worker is available to fill the job opportunity, and unless the employment of the foreign worker in the job opportunity will not adversely affect the wages or working conditions of similarly employed U.S. workers.

(b) *The statutory standard.* The Immigration and Nationality Act (the Act) (8 U.S.C. 1101 et seq.) regulates the admission of immigrant and non-immigrant aliens into the United States. Section 1101 (a)(15)(H)(ii), 8 U.S.C., defines "nonimmigrant aliens" as folows:

(a) As used in this chapter

* * * * *

(5) The term "immigrant" means an alien except an alien who is within one of the following classes of nonimmigrant aleins—

(H) An alien having residence in a foreign country which he has no intention of abandoning.

* * * * *

(ii) Who is coming temporarily to the United States to perform temporary services of labor, if unemployed persons capable of performing such service or labor cannot be found in this country.

The basis for the admission of nonimmigrant aliens into the United States is set by section 1184(a), 8 U.S.C. which provides in pertinent part:

(a) The admission to the United States of any alien as a nonimmigrant shall be for such time and under such conditions as the Attorney General may be regulations prescribe***

Section 1184(c), 8 U.S.C., directs the Attorney General to consult with "appropriate agencies of the Government" prior to a determination on the petition of an employer for the importation of temporary nonimmigrant alien workers:

(c) The question of importing any alien as a nonimmigrant under section 1101(a)(15)(H) or (L) of this title in any specific case or specific cases shall be determined by the Attorney General, after consultation with appropriate agencies of the Government, upon petition of the importing employer. Such petition shall be made and approved before the visa is granted. The petition shall be in such form and contain such information as the Attorney General shall prescribe. The approval of such a petition shall not, of itself, be construed as establishing that the alien is a nonimmigrant.

(c) *The INS regulations.* The Attorney General, through the Immigration and Naturalization Service (INS), has promulgated regulations to implement the Attorney General's responsibilities regarding the admission of temporary foreign workers. These regulations, which are codified at 8 CFR 214.2(h)(3), adopt the same admission standards for nonimmigrant temporary foreign workers that the INA (8 U.S.C. 1182(a)(14) (A) and (B)) requires for certain immigrants who seek to perform permanent work in the United States. They also provide employers the right to an adjudicatory review before the INS whenever the Secretary has advised the INS that one or both of the factual determinations cannot be made, 8 CFR 214.2(h)(3)(i) requires:

[A] certification from the Secretary of Laborstating that qualified persons in the United States are not available (see 8 U.S.C. 1182(a)(14)(A)) and that the employment of the beneficiary will not adversely affect

the wages and working conditions of workers in the United States similarly employed (see 8 U.S.C. 1182(a)(14)(B)) or a notice that such a certification cannot be made, shall be attached to every nonimmigrant visa petition to accord an alien a classification under section 10(a)(a)(15)(H)(ii) of the Act. If there is attached to the petition a notice from the Secretary of Labor that certification cannot be made, the petitioner shall be permitted to present countervailing evidence that qualified persons in the United States are not available and that the employment policies of the Department of Labor have been observed. All such evidence submitted will be considered in the adjudication of the petition.

Under the authority of the INA and the INS regulations the Secretary of Labor has promulgated the reulations in this part. They set forth the requirements and procedures applicable to requests for certification by employers seeking the services of temporary foreign workers. They provide the Secretary's methodology for the two-fold determination of availability of domestic workers for, and of any adverse effect which would be occasioned by, the use of foreign workers for particular temporary jobs in the United States.

(d) *The Secretary's determinations.* Before any factual determination can be made concerning the availability of U.S. workers to perform particular job opportunities, two steps must be taken. First, the minimum level of wages, terms. benefits, and conditions for the particular job opportunities, below which similarly employed U.S. workers would be adversely affected, must be established. (The regulations in this part establish such minimum levels for wages, terms, benefits, and conditions of employment.) Second, the wages, terms, benefits, and conditions offered and afforded to the aliens must be compared to the establishe dminimum levels. If it is

concluded that adverse effect would result, the ultimate determination of availability within the meaning of the INA cannot be made since U.S. workers cannot be expected to accept employment under conditions below the established minimum levels. *Florida Sugar Cane League, Inc. v. Usery,* 531 F.2d 299 (5th Cir. 1976.)

Once a determination of no adverse effect has been made, the availability of U.S. workers can be tested only if U.S. workers are actively recruited through the offer of wages, terms, benefits, and conditions at least at the minimum level or the level offered to the aliens, whichever is higher. The regulations in this part set forth requirements for recruiting U.S. workers in accordance with this principle.

(e) *Construction.* This part and its subparts shall be construed to effectuate the purpose of the INA that U.S. workers rather then aliens be employed wherever possible. *Elton Orchards, Inc. v. Brennan,* 508 F. 2d 493, 500 (1st Cir. 1974), *Flecha v. Quiros,* 567 F.2d 1154 (1st Cir. 1977). Where temporary alien workers are admitted, the terms and conditions of their employment must not result in a lowering of the terms and conditions of domestic workers similarly employed, *Williams v. Usery,* 531 F. 2d 305 (5th Cir. 1976); *Florida Sugar Cane League, Inc.* v. *Usery,* 531 F.2d 299(5th Cir.1976), and the job benefits extended to any U.S. workers shall be at least those extended to the alien workers.

§ 655.00 Authority of the Regional Administrator.

Pursuant to the regulations under this part, temporary labor certification determinations are ordinarily made by the Regional Administrator of an Employment and Training Administration region. The Administrator, however, may direct that certain types of applications or

certain applications shall be handled by, and the determinations made by, the United States Employment Service (USES) in Washington, D.C. In those cases the Regional Administrator will informally advise the employer or agent of the name of the official who will make determinations with respect to the application.

Subpart C—Labor Certification Process for Temporary Agricultural and Logging Employment

§ 655.200 General Description of this subpart and definition of terms.

(a) An employer who desires to use foreign workers for temporary employment must file a temporary labor certification application including a job offer for U.S. workers with a local office of a State employment service agency. The employer should file an application a minimum of 80 days before the estimated date of need for the workers. If filed 80 days before need, sufficient time is allowed for the 60-day recruitment period required by the regulations and a detrmination by the Regional Administrator (RA) as to the availability of U.S. workers 20 days before the date of need. Shortly after the application has been filed, the RA makes a determination as to whether or not the application has been filed in enough time to recruit U.S. workers and whether or not the job offer for U.S. workers offers wages and working conditions which will not adversely affect the wages and working conditions of similarly employed U.S. workers, as prescribed in the regulations in this subpart. If the application does not meet the regulatory wage and working condition standards, the RA shall deny the temporary labor certification application and offer the employer an administrative judicial review of the denial by a Department of Labor Hearing Officer. If the

application is not timely, the RA has discretion, as set forth in these regulations, to either deny the application or permit the process to proceed reasonably with the employer recruiting U.S. workers upon such terms as will accomplish the purposes of the INA and the INS regulations. Where the application is timely and meets the regulatory standards, the State employment service agency, the employer, and the Department of Labor recruit U.S. workers for 60 days. At the end of the 60 days, the RA grants the temporary labor certification if the RA finds that (1) the employer has not offered foreign workers higher wages or better working conditions (or less restrictions) than that offered to U.S. workers, and (2) U.S. workers are not available for the employer's job opportunities. If the temporary labor certification is denied, the employer may seek an administrative-judicial review of the denial by a Department of Labor Hearing Officer as provided in these regulations. The Department of Labor thereafter advises the Immigration and Naturalization Service (INS) of aprovals and denials of temporary labor certifications. The INS may accept or reject this advice. 8 CFR 214.2(h)(3). The INS makes the final decision as to whether or not to grant visas to the foreign workers. 8 U.S.C. 1184(a).

(b) *Definitions for terms used in this subpart.* "Administrator" menas the chief official of the United States Employment Service or the Administrator's designee

"Adverse effect rate" means the wage rate which the Administrator has determined must be offered and paid to foreign and U.S. workers for a particular occupation and/or area so that the wages of similarly employed U.S. workers will not be adversely affected. The Administrator may determine that the prevailing wage rate in the area and/or occupation is the adverse effect rate, if the use (or non-use) of aliens has not depressed the wages of similarly

employed U.S. workers. The Administrator may determine that a wage rate higher than the prevailing wage rate is the adverse effect rate if the Administrator determines that the use of aliens has depressed the wages of similarly employed U.S. workers.

"Agent" means a legal person, such as an association of employers, which (1) is authorized to act as an agent of the employer for temporary labor certification purposes, and (2) which is not itself an employer, or a joint employer, as defined in this section.

"Area of intended employment" means the area within normal commuting distance of the place (address) of intended employment. If the place of intended employment is within a Standard Metropolitan Statistical Area (SMSA), any place within the SMSA is deemed to be within normal commuting distance of the place of intended employment.

"Employer" means a person, firm, corporation or other association or organization (1) which currently has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ a worker at a place within the United States and (2) which has an employer relationship with respect to employees under this subpart as indicated by the fact that it hires, pays, fires, supervises and otherwise controls the work of such employees. An association of employers shall be considered an employer set forth in this definition. Such an association, however, shall be considered as a joint employer with the employer member if it shares with the employer member one or more of the definitional indicia.

"Employment and Training Administration (ETA)" means the agency within the Department of Labor (DOL) which includes the United States Employment Service (USES).

"Hearing Officer" means a Department of Labor official, whether Administrative Law Judge or Hearing Officer, who is authorized to conduct administrative hearings.

"Immigration and Naturalization Service (INS)" means the component of the U.S. Department of Justice which makes the determination under the Immigration and Nationality Act (INA) on whether or not to grant a visa to an alien seeking to perform temporary agricultural or logging work in the United States.

"Job opportunity" means a job opening for temporary, full-time employment at a place in the United States to which U.S. workers can be referred.

"Local office" means an office of a State employment service agency which serves a particular geographic area within a State.

"Regional Administrator, Employment and Training Administration (RA)" means the chief official of the Employment and Training Administration (ETA) in a Department of Labor (DOL) regional office.

"Secretary" means the Secretary of Labor or the Secretary's designee.

"State agency" means the State employment service agency.

"Temporary labor certification" means the advice given by the Secretary of Labor to the Immigration and Naturalization Service, pursuant to the regulations of that agency at 8 CFR 214.2(h)(3)(i), that (1) there are not sufficient U.S. workers who are qualified and available to perform the work and (2) the employment of the alien will not adversely affect the wages and working conditions of similarly employed U.S. workers.

"United States Employment Service (USES)" means the agency of the U.S. Department of Labor, established

under the Wagner-Peyser Act of 1933, which is charged with administering the national system of public employment offices and carrying out the functions of the Secretary under the Immigration and Nationality Act.

"United States workers" means any worker who, whether U.S. national, citizen or alien, is legally permitted to work permanently within the United States.

§ 655.201 Temporary labor certification applications.

(a) (1) An employer who anticipates a labor shortage of workers for agricultural or logging employment may request a temporary labor certification for temporary foreign workers by filing, or by having an agent file, in duplicate, a temporary labor certification application, signed by the employer, with a local office in the area of intended employment.

(2) If the temporary labor certification application is filed by an agent, however, the agent may sign the application if the application is accompanied by a letter from each employer the agent represent, signed by the employer, which authorizes the agent to act on the employer's behalf and which states that the employer assumes full responsibility for the accuracy of the application, for all representations made by the agent on the employer's behalf, and for the fulfillment of all legal requirements arising under this subpart.

(3) If an association of employers files the application, the association shall identify and submit documents to veify whether, in accordance with the definitions at §655.200, it is (i) the employer, (ii) a joint employer with its member employers, or (iii) the agent of its employer members.

(b) Every temporary labor certification application shall include:

(1) A copy of the job offer which wil be used by the

employer (or each employer) for the recruitment of both U.S. and foreign workers. The job offer for each employer shall state the number of workers needed by the employer, and shall be signed by the employer. The job offer shall comply with the requirements of §655.202 and §658.108 of this chapter;

(2) The assurances required by §655.203; and

(3) The specific estimated date of need of workers.

(c) The entire temporary labor certification application shall be filed with the local office in duplicate and in sufficient time to allow the State agency to attempt to recruit U.S. workers locally and through the Employment Service intrastate and interstate clearance system for 60 calendar days prior to the estimated date of need. Section 655.206 requires the RA to grant or deny the temporary labor certification application by the end of the 60 calendar days, or 20 days from the estimated date of need, whichever is later. That section also requires the RA to offer employers an expedited administrative-judicial Finally, employers need time, after the temporary labor certification applications. Following an administrative-judicial review, the employer has a right to contest any denial before the INS pursuant to 8 CFR 214.2(h)(3)(i). Finally, employers need time, after the temorary labor certification determination, to complete the process for bringing foreign workers into the United States, or to bring an appeal of a denial of an application for the labor certification. Therefore, employers should file their temporary labor certification applications at least 80 days before the estimated date of need specified in the application.

(d) Applications may be amended at any time prior to RA determination to increase the number of workers requested in the original application for labor certification

by not more than 15 percent without requiring an additional recruitment period for U.S. workers. Requests for increases beyond 15 percent may be approved only when it is determined that, based on past experience, the need for additional workers could not be foreseen and that a critical need for the workers would exist prior to the expiration of an additional recruitment period.

(e) If a temporary labor certification application, or any part thereof, does not satisfy the time requirements specified in paragraph (c) of this section, and if the exception in paragraph (d) of this section does not apply, the local office shall immediately send both copies directly to the appropriate Regional Administrator (RA). The RA may then advise the employer and the INS in writing that the temporary labor certification cannot be granted because, pursuant tot he regulations at paragraph (c) of this section, there is not sufficient time to test the availability of U.S. workers. The notice of denial to the employer shall inform the employer of the right to administrative-judicial review and to ultimately petition INS for the admission of the aliens. In emergency situations, however, the RA may waive the time period specified in this section on behalf of employers who have not made use of temporary alien workers for the prior year's harvest or for other good and substantial cause, provided the RA has sufficient labor market information to make the labor certification determinations required by 8 CFR 214.2(h)(3)(i).

§ 655.202 Contents of job offers.

(a) So that the employment of aliens will not adversely affect the wages and working conditions of similarly employed U.S. workers, each employer's job offer to U.S. workers must offer U.S. workers at least the same benefits

which the employer is offering, intends to offer, or will afford, to temporary foreign workers. Conversely, no job offer may impose on U.S. workers any restrictions or obligations which will not be imposed on the employer's foreign workers. For example, if the employer intends to advance transportation costs to foreign workers either directly or indirectly (by having them paid by the foreign government involved), the employer must offer to advance the transporation costs of U.S. workers.

(b) Except when higher benefits, wages or working conditions are required by the provisions of paragraph (a) of this section, the Administrator has determined that, in order to protect similarly employed U.S. workers from adverse effect with respect to wages and working conditions, every job offer for U.S. workers must always include the following minimal benefit, wage, and working condition provisions:

(1) The employer will provide the worker with housing without charge to the worker. The housing will meet the full set of Department of Labor, Occupational Safety and Health Administration standards set forth at 29 CFR 1910.142 (or the full set of standards of 20 CFR Part 620, if applicable. See the FEDERAL REGISTER of December 9, 1977, for applicability criteria), except that range housing for sheepherders shall meet guidelines which shall be issued periodically by the Department. When it is the prevailing practice in the area of intended employment to provide family housing, the employer will provide such housing to such workers;

(2)(i) If the job opportunity is covered by the State workers' compensation law, the worker will be eligible for workers' compensation for injury and disease arising out of an in the course of worker's employment; or

(ii) If the job opportunity is not covered by the State workers' compensation law, the employer will provide at

no cost to the worker, insurance covering injury and disease arising out of and in the course of the worker's employment which will provide benefits at least equal to those provided under the State workers' compensation law for comparable employment;

(3) The employer will provide without cost to the worker all tools, supplies and equipment required to perform the duties assigned and, if any of these items are provided by the worker, the employer will reimburse the worker for the cost of those so provided;

(4) The employer will provide the worker with three meals a day. The job offer shall state the cost to the worker for such meals. The cost shall not be more than $3.25 per day unless the RA has approved a higher cost pursuant to §655.211.

(5) (i) The employer will provide or pay for the worker's transportation and daily subsistence from the place, from which the worker, without intervening employment, will come to work for the employer, to the place of employment, subject to the deductions allowed by paragraph (b)(13) of this section. The amount of the daily subsistence payment shall be at least as much as the amount the employer will charge the worker with three meals a day during employment;

(ii) If the worker completes the work contract period, the employer will provide or pay for the worker's transporation and daily subsistence from the place of employment to the place, from which the worker, without intervening employment, came to work for the employer, unless the worker has contracted for employment with a subsequent employer who, in that contract, has agreed to pay for the worker's transportation and daily subsistence expenses from the employer's worksite to such subsequent employer's worksite; and

(iii) The employer will provide transportation between the worker's living quarters and the employer's worksite without cost to the worker, and such transportation will be in accordance with applicable laws and regulations;

(6)(i) The employer guarantees to offer the worker employment for at least three-fourths of the workdays of the total period during which the work contract and all extensions thereof are in effect, beginning with the first workday after the arrival of the worker at the place of employment and ending on the termination date specified in the work contract, or in its extensions if any. For purposes of this paragrph, a workday shall mean any period consisting of 8 hours of work time. An employer shall not be considered to have met the work guarantee if the employer has merely offered work on three-fourths of the workdays. The work must be offered for at least three-fourths of the 8 hour workdays. (That is, ¾ x (number of days x 8 hours)) Therefore, if, for example, the contract contains 20 workdays, the worker must be offered employment for 120 hours during the 20 workdays. A worker may be offered more than 8 hours of work on a single workday. For purposes of meeting the guarantee, however, the worker may not be required to work for more than 8 hours per workday, or on the worker's Sabbath or Federal holidays;

(ii) If the worker will be paid on a piece rate basis, the employer will use the worker's average hourly earnings to calculate the amount due under the guarantee; and

(iii) Any hours which the worker fails to work when the worker has been offered an opportunity to do so pursuant to paragraph (b)(6)(i) of this section, and all hours of work actually performed (including voluntary work over 8 hours in a workday, or on the worker's Sabbath or Federal holidays) may be counted by the employer in calculating whether the period of guaranted employment has been met;

(7)(i) The employer will keep accurate and adequate records with respect to the workers' earnings, including field tally records, supporting summary payroll records, and records showing: The nature and amount of the work performed; the number of hours of work offered each day by the employer (broken out by hours offered both in accordance with, and over and above, the guarantee); the hours actually worked each day by the worker; the time the worker began and ended each workday; the rate of pay; the worker's earnings per pay period; and the amount of and reasons for any and all deductions made from the worker's wages;

(ii) If the number of hours worked by the worker is less than the number offered in accordance with the guarantee, the records will state the reason or reasons therefor;

(iii) The records, including field tally records and supporting summary payroll records, will be made available for inspection and copying by representatives of the Secretary of Labor, and by the worker and the worker's representatives; and

(iv) The employer will retain the records for not less than three years after the completion of the contract;

(8) The employer will furnish to the worker at or before each payday, in one or more written statements:

(i) The worker's total earnings for the pay period;

(ii) The worker's hourly rate or piece rate of pay;

(iii) The hours of employment which have been offered to the worker (broken out by offers in accordance with, and over and above, the guarantee);

(iv) The hours actually worked by the worker;

(v) An itemization of all deductions made from the worker's wages; and

(vi) If piece rates are used, the units produced daily;

(9) (i) If the worker will be paid by the hour, the employer will pay the worker at least the adverse effect rate; or

(ii) If the worker will be paid on a pice rate basis, the piece rate will be designed to produce average hourly earnings at least equal to the adverse effect rate. If the piece rate does not reult at the end of the pay period in average hourly earnings during the pay period at least equal to the amount the worker would have earned had the worker been paid at the adverse effect rate, the worker's pay will be supplemented at that time so that the worker's earnings are at least as much as the worker would have earned during the pay period if the worker had been paid at the adverse effect rate;

(10) The frequency with which the worker will be paid (in accordance with the prevailing practice in the area of intended employment, or at least biweekly whichever is more frequent);

(11) If the worker voluntarily abandons employment before the end of the contract period, or is terminated for cause, the employer will not be responsible for providing or paying for the subsequent transportation and subsistence expenses of any worker for whom the employer would have otherwise been required to pay such expenses under paragraph (b)(5)(ii) of this section;

(12) If, before the expiration date specified in the work contract, the services of the worker are no longer required for reasons beyond the control of the employer due to fire or other Act of God which makes the fulfillment fo the contract impossible, and the RA so certifies, the employer may terminate the work contract. In such cases the employer will make efforts to transfer the worker to other comparable employment acceptable to the worker. If such transfer is not effected, the worker (i) will be returned to the place from which the worker, without

intervening employment, came to work for the employer at the employer's expense; and

(ii) Will be reimbursed the full amount of any deductions made from the worker's pay by the employer for transportation and subsistence expenses to the place of employment borne directly or indirectly by the employer;

(13) The employer will make those deductions from the worker's paycheck which are required by law. The job offer shall specify all deductions, not required by law, which the employer wil make from the worker's paycheck. All deductions shall be reasonable. The employer may deduct the cost fo the worker's transportation and daily subsistence expenses to the place of employment which were borne directly by the employer; in such cases, however, the job offer shall state that the worker will be reimbursed the full amount of such deductions upon the worker's completion of 50 percent of the worker's contract period; and

(14) The employer will provide the worker a copy of the work contract between the employer and the worker. The work contract shall contain all of the provisions required by paragraphs (a) and (b) of this section.

§655.203 Assurances.

As part of the temporary labor certification application, the employer shall include assurances, signed by the employer, that:

(a) The job opportunity is not:

(Vacant because the former occupant is on strike or being locked out in the course of a labor dispute; or

(2) At issue in a labor dispute involving a work stoppage;

(b) During the period for which the temporary labor certification is granted, the employer will comply with applicable Federal, State and local employment-related

laws, including employment related health and safety laws;

(c) The job opportunity is open to all qualified U.S. workers without regard to race, color, national origin, sex, or religion, and is open to U.S. workers with handicaps who are qualified to perform the work. No U.S. worker will be rejected for employment for other than a lawful job related reason;

(d) The employer will cooperate with the employment service system in the active recruitment of U.S. workers until the foreign workers have departed for the employer's place of employment by;

(1) Allowing the employment service system to prepare local, intrastate and interstate job orders using the information supplied on the employer's job offer;

(2) Placing at least two advertisements for the job opportunities in local newspapers of general circulation.

(i) Each such advertisement shall describe the nature and anticipated duration of the job opportunity; offer at least the adverse effect wage rate; give the ¾ guarantee; state that work tools, supplies and equipment will be provided by the employer; state that housing will also be provided, and that transportation and subsistence expenses to the worksite will be provided or paid for by the employer;

(ii) Each advertisement shall diret interested workers to apply for the job opportunity at a local employment service office in their area;

(3) Cooperating with the employment service system in contacting farm labor contractors, migrant workers and other potential workers in other areas of the State and/or Nation by letter and/or telephone;

(4) Cooperating with the employment service system in contacting schools, business and labor organization, fraternal and veterans organizations, and non-profit

organizations and public agencies such as sponsors of programs under the Comprehensive Employment and Training Act, throughout the area of intended employment, in order to enlist them in helping to find U.S. workers; and

(5) If the employer, or an association of employers of which the employer is a member, intends to negotiate and/or contract with the Government of a foreign nation or any foreign association, corporation or organization in order to secure foreign workers, making the same kind and degree of efforts to secure U.S. workers;

(e) From the time the foreign workers depart for the employer's place of employment, the employer will provide employment to any qualified U.S. worker who applies to the employer until fifty percent fo the period of the work contract, under which the foreign worker who is in the job was hired, has elapsed. In addition, the employer will offer to provide housing, and the other benefits, wages, and working conditions required by §655.202, to any such U.S. worker; and

(f) Performing the other specific recruitment activities specified in the notice from the RA required by §655.205(a).

§655.204 Determinations based on temporary labor certification applications.

(a) Within two working days after the temporary labor certification aplication has been filed with it, the local office shall mail the duplicate application directly to the apropriate RA.

(b) The local office, using the job offer portion of its copy of the temporary labor certification application, shall promptly prepare a local job order and shall begin to recruit U.S. workers in the area of intended employment.

(c) The RA, upon receipt of the duplicate temporary labor certification application, shall promptly review the application to determine whether it meets the requirements of §§655.201-655.203 in order to determine whether the employer's application is (1) timely, and (2) contains offers of wages, benefits, and working conditions required to ensure that similarly employed U.S. workers will not be adversely affected. If the RA determines that the temporary labor certification application is not timely in accordance with §655.201 of this subpart, the RA may promptly deny the temporary labor certification on the grounds that, in accordance with that regulation, there is not sufficient time to adequately test the availability of U.S. workers. If the RA determines that the application does not meet the requirements of §§655.202-655.203 because the wages, working conditions, benefits, assurances, job offer, etc. are not as required, the RA shall deny the certification on the grounds that the availability of U.S. workers cannot be adequately tested because the wages or benefits, etc. do not meet the adverse effect criteria.

(d) If the certification is denied, the RA shall notify the employer in writing of the determination, with a copy to the local office and the Administrator. The notice shall:

(1) State the reasons for the denial citing the relevant regulations; and

(2) Offer the employer an opportunity to request an expedited administrative-judicial review of the denial by a Department of Labor (DOL) Hearing Officer. The notice shall state that, in order to obtain such a review, the employer must, within five calendar days of the date of the notice, telegraph a written request for such a reveiw to the Chief Administrative Law Judge of the Department of Labor (giving the address) and to the Regional Administrator. The notice shall also state that the

employer's request for review should contain any legal arguments which the employer believes will rebut the basis of the RA's denial of certification; and

(3) State that, if the employer does not request an expedited administrative-judicial review before a DOL Hearing Officer within the five days:

(i) The RA will advise the INS that the certification cannot be granted, giving the reasons therefor, and that an administrative-judicial review of the denial was offered to the employer but not accepted, and enclosing, for INS review, the entire temporary labor certification application file; and

(ii) The employer has the opportunity to submit evidence to the INS to rebut the bases of the RA's determination in accordance with the INS regulation at 8 CFR 214.2(h)(3)(i) but that no further review of the employer's application for temporary labor certification may be made by any Department of Labor official.

(e) If the employer timely requests an expedited administrative-judicial review pursuant to paragraph (d)(2) of this section, the procedures of §655.212 shall be followed.

§655.205 Recruitment period.

(a) If the RA determines that the temporary labor certification application meets the requirements of §§655.201-655.203, the RA shall promptly notify the employer in writing, with copies to the State agency and local office The notice shall inform the employer and the State agency of the specific efforts which will be expected from them during the following weeks to carry out the assurances contained in §655.203 with respect to the recruitment of U.S. workers. The notice shall require that the job order be placed both into intrastate clearance and

into interstate clearance to such States as the RA shall determine to be potential sources of U.S. workers.

(b) Thereafter, the RA, under the direction of the ETA national office and with the assistance of other RAs with respect to areas outside the region, shall provide overall direction to the employer and the State agency with respect to the recruitment of U.S. workers.

(c) By the 60th day of the recruitment period, or 20 days before the date of need specified in the application, whichever is later, the RA, when making a determination of the availability of U.S. workers, shall also make a determination as to whether the employer has satisfied the recruitment assurances in §655.203. If the RA concludes that the employer has not satisfied the requirement for recruitment of U.S. workers, the RA shall deny the temporary labor certification, and shall immediately notify the employer in writing with a copy to the State agency and local office. The notice shall contain the statements specified in §655.212 shall be followed.

(d) If the employer timely requests an expedited administrative-judicial review before a DOL Hearing Officer, the procedures in §655.212 shall be followed.

§ 655.206 Determinations of U.S. worker availability and adverse effect on U.S. workers.

(a) If the RA, in accordance with §655.205 has determined that the employer has complied with the recruitment assurances, the RA, by 60th day of the recruitment period, or 20 days before the date of need specified in the application, whichever is later, shall grant the temporary labor certification for enough aliens to fill the employer's job opportunities for which U.S. workers are not available. In making this determination the RA shall consider as available for a job opportunity any U.S.

worker who has made a firm commitment to work for the employer, including those workers committed by other authorized persons such as farm labor contractors and family heads; such a firm commitment shall be considered to have been made not only by workers who have signed work contracts with the employer, but also by those whom the RA determines are very likely to sign such a work contract. The RA shall also count as available any U.S. worker who has applied to the employer (or on whose behalf an application has been made), but who was rejected by the employer for other than lawful job-related related reasons unless the RA determines that:

(1) Enough qualified U.S. workers have been found to fill all the employer's job oportunities; or

(2) The employer, since the time of the initial determination under §655.204, has adversely affected U.S. workers by offering to, or agreeing to provide to, alien workers better eages, working conditons, or benefits (or by offering or agreeing to impose on alien workers less obligations and restrictions) than that offered to U.S. workers.

(b)(1) Temporary labor certifications shall be considered subject to the conditions and assurances made during the application process. Temporary labor certifications shall be for a limited duration such as for "the 1978 apple harvest season" or "until November 1, 1978", and they shall never be for more than eleven months. They shall be limited to the employer's specific job opportunities; therefore, they may not be transferred from one employer to another.

(2) If an association of employers is itself the employer, as defined in §655.200, certifications shall be made to the association and may be used for any of the job opportunities of its employer members and workers may be transferred among employer members.

(3) If an association of employers is a joint employer with its employer members, as defined in §655.200, the certification shall be made jointly to the association and the employer members. In such cases workers may be transferred among the employer members provided the employer members and the association agree in writing to be jointly and severally liable for compliance with the temporary labor certification obligations set forth in this subpart.

(c) If the RA denies the temporary labor certification in whole or part, the RA shall notify the employer in writing, and by telegram. The notice shall contain all of hte statements required in §655.204(d). If a timely request is made for an administrative-judicial review by a DOL Hearing Officer, the procedures of §655.212 shall be followed.

(d)(1) After a temporary labor certification has been granted, the employer shall continue its efforts to actively recruit U.S. workers until the foreign workers have departed for the employer's place of employment. The employer, however, must keep an active job order on file until the assurance at §655.203(e) is met.

(2) The ES system shall continue to actively recruit and refer U.S. workers as long as there is an active job order on file.

§655.207 Adverse effect rates.

(a) Except as otherwise provided in this section, the adverse effect rates for all agricultural and logging employment shall be the prevailing wage rates in the area of intended employment.

(b)(1) For agricultural employment in the States listed in paragraph (b)(2) of this section, and for Florida sugar cane work, the adverse effect rate for each year shall be computed by adjusting the prior year's adverse effect rate

by the percentage change (from the second year previous to the prior year) in the U.S. Department of Agriculture farm wage rates for agricultural workers. The Administrator shall annually publish adverse effect rates calculated pursuant to this paragraph as a notice in the FEDERAL REGISTER.

(2) *List of States.* Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New York, Maryland, Virginia, and West Virginia. Other States may be added as appropriate.

(c) In any year in which the applicable adverse effect rate is increased, employers shall adjust their piece rates upward to avoid requiring a worker to increase his or her productivity over the previous year in order to earn an amount equal to what the worker would earn if the worker were paid at the adverse effect rate.

(d) The Administrator may periodically publish adverse effect piece rates for selected occupations. If the Administrator decides to do so, the methodology for establishing such piece rates shall be published as proposed rulemaking as an amendment to this section. The methodology shall take into account the changes in adverse effect rates. After the methodology is published as final rulemaking, the Administrator may publish adverse effect piece rates, calculated pursuant to the methodology, by notice in the FEDERAL REGISTER.

§655.208 Temporary labor certification applications involving fraud or willful misrepresentation.

(a) If possible fraud or willful misrepresentation involving a temporary labor certification application is discovered prior to a final temporary labor certification determination, or it it is learned that the employer or agent (with respect to an application) is the subject of a

criminal indictment or information filed in a court, the RA shall refer the matter to the INS for investigation and shall notify the employer or agent in writing of this referral. The RA shall continue to process the application and may issue a qualified temporary labor certification.

(b) If a court finds an employer or agent innocent of fraud or willful misrepresentation, or if the Department of Justice decides not to prosecute an employer or agent, the RA shall not deny the temporary labor certification application on the grounds of fraud or willful misrepresentation. The application, of course, may be denied for other reasons pursuant to this subpart.

(c) If a court or the INS determines that there was fraud or willful misrepresentation involving a temporary labor certification application, the application shall be deemed invalidated, processing shall be terminated, and the application shall be returned to the employer or agent with the reasons therefor stated in writing.

§655.209 Invalidation of temporary labor certifications.

After issuance, temporary labor certifications are subject to invalidation by the INS upon a determination made in accordance with that agency's procedures or by a Court, of fraud or willful misrepresentation of a material fact involving the temporary labor certification application. If evidence of such fraud or willful misrepresentation becomes known to a Regional Administrator, Employment and Training Administration or to the Administrator, the Regional Administrator or Administrator as appropriate, shall notify the INS in writing.

§655.210 Failure of employers to comply with the terms of a temporary labor certification.

(a) If, after the granting of a temporary labor certification, the RA has probable cause to believe that an employer has not lived up to the terms of the temporary labor certification, the RA shall investigate the matter. If the RA concludes that the employer has not complied with the terms of the labor certification, the RA may notify the employer that it will not be eligible to apply for a temporary labor certification in the coming year. The notice shall be in writing, shall state the reasons for the determination, and shall offer the employer an opportunity to request a hearing within 30 days of the date of the notice. If the employer requests a hearing within the 30-day period, the RA shall follow the procedures set forth at §658.421(i)(1), (2) and (3) of this chapter. The procedures contained in §658.421(j), 658.422 and 658.423 of this chapter shall apply to such hearings.

(b) No other penalty shall be imposed by the employment service on such an employer other than as set forth in paragraph (a) of this section.

§655.211 Petitions for higher meal charges.

(a) An RA may permit an employer to charge workers up to $4 for providing them with 3 meals per day if the employer justifies the charge by submitting documentary evidence to the RA. A denial in whole or in part shall be reviewable as provided in §655.212.

(b) Evidence submitted shall include the cost of goods and services directly related to the preparation and serving of meals, the number of workers fed, the number of meals served and the number of days meals were provided. The cost of the following items may be included: Food; kitchen supplies other than food, such as lunch bags and soap; labor costs which have a direct

relation to food service operations, such as wages of cooks and restaurant supervisors; fuel, water, electricity, and other utilities used for the food service opeations; other costs directly related to the food service operation. Charges for transportation, depreciation, overhead, and similar charges may not be included. Receipts and other cost records for a representative pay period shall be available for inspection by the Secretary's representatives for a period of one year.

§655.212 Administrative-judicial reviews.

(a) Whenever an employer has requested an administrative-judicial review of a denial of an application or petition in accordance with §§655.204(d), 655.205(d), 655.206(c), or 655.211 by telegram, the Chief Admnistrative Law Judge shall immediately assign a Hearing Officer to review the record for legal sufficiency, and the Regional Administrator shall send a certified copy of the case file to the Chief Administrative Law Judge by means normally assuring next day delivery. The Hearing Officer shall not have authority to remand the case and shall not receive additional evidence. Any contervailing evidence advanced after decision by the Regional Administrator shall be subject to provisions of 8 CFR 214.2(h)(3)(i).

(b) The Hearing Officer, within five working days after receipt of the case file shall, on the basis of the written record and due consideration of any written memorandums of law submitted, either affirm, reverse or modify the RA's denial by written decision. The decision of the Hearing Officer shall specify the reasons for the action taken and shall be immediately provided to the employer, RA, Administrator, and INS by telegram or hand delivery. The Hearing Officer's decision shall be the final decision of the Department of Labor and no further review shall be given to the temporary labor certification determination by any Department of Labor official.